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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF
THE COALITION FOR EQUITY IN LICENSING

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November 10, 1993

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SUMMARY

The Coalition's comments concentrate solely on the Commission's possible use of auctions to license applications currently on file for cellular unserved areas and Rural Service Areas.

The Coalition urges the Commission to license Cellular by lottery, rather than by auction. The use of auctions to license these services would constitute an impermissible retroactive application of rule and law. Consideration of each of the well-established standards that must be applied in assessing the permissibility of applying rules and law retroactively requires the Commission to apply auction only prospectively.

Holding aside the very critical issue of retroactivity, the Commission can license by auction only if the criteria set forth in the Budget Act permit. The Coalition submits that any reasonable consideration of those criteria demonstrates that auctions should not be utilized to license Cellular applications.

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COMMENTS

The Coalition for Equity in Licensing (the "Coalition"),[1/] by its attorney and pursuant to Section 1.415 of the Commission's rules, hereby submits its Comments in the captioned proceeding.[2/] By these Comments, the Coalition focuses solely on that aspect of the Commission's Notice that either proposes, or leaves open the possibility, that Cellular Applications for markets that are currently unlicensed will be licensed by auction, rather than by lottery. For the reasons set forth below, the Coalition submits that it would be wholly inappropriate for the

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1/ The Coalition is an unincorporated association composed solely of applicants having pending before the Commission cellular applications, either for Rural Service Areas ("RSAs") or for unserved areas (collectively, "Cellular Applications"). Accordingly, the Coalition and each of its members are interested parties in this proceeding. Attachment 1 hereto is a listing of members of the Coalition.

2/ Notice of Proposed Rulemaking, PP Docket No. 93-253, 58 Fed. Reg. 53489 (October 15, 1993) ("Notice"). In the Notice, the Commission requested that comments be filed on or before November 10, 1993, and that reply comments be filed on or before November 24, 1993.

Commission to license these Cellular Applications by auction. In support thereof, the following is shown.

I. Introduction

By its Notice, the Commission sought to comply with the requirement of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") which directed the Commission to prescribe regulations implementing newly established Section 309(j) of the Communications Act[3/] within 210 days after enactment of the Budget Act, or by March 8, 1994. Pursuant to the Budget Act, the Commission may not issue any license or permit by lottery unless either (a) the spectrum's use is not a type for which auctions are permitted pursuant to Section 309(j)(2)(A), or (b) the application was accepted for filing before July 26, 1993. See Section 6002(c) of the Budget Act.

The Budget Act generally requires the Commission to satisfy several conditions before competitive bidding may be utilized to select licensees. In particular, Section 309(j)(2)(B) provides that the Commission must determine that use of a system of competitive bidding will promote the objectives set forth in Section 309(j)(3), which include the following: (a) the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas, without

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3/ Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §309(j) (the "Communications Act").

administrative or judicial delays; (b) the promotion of economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of licenses; (c) the recovery for the public of a portion of the value of the spectrum made available for public use and avoidance of unjust enrichment; and (d) the efficient and intensive use of the electromagnetic spectrum.[4/]

The Budget Act also requires the Commission to undertake a number of other complex analyses as it formulates rules governing the use of competitive bidding. These include, inter alia, identification of certain groups to be accorded preferred positions in the bidding process. See generally, Section 309(j)(4) of the Budget Act. Equally significant, the Budget Act contains an overriding restriction on FCC authority: the Commission is not permitted to base any of its findings of public interest, convenience and necessity on the expectation of federal revenues that would result in use of competitive bidding. See Section 309(j)(7) of the Budget Act.[5/]

4/ There must be mutually exclusive applications that have been accepted for filing by the Commission, and these applications must be for an initial license or construction permit, as opposed to a license renewal.

5/ Before the Commission may begin to license by competitive bidding, the Secretary of Commerce must have submitted a report on the reallocation of certain governmental (continued...)

II. Discussion

A. The Commission's Proposal

In its Notice, the Commission addressed a multitude of auction-related issues, as mandated by the Congress. The Coalition's comments focus on a select few portions of the Notice. In particular, the Coalition concentrates on the Commission's discussion of the licensing of Cellular as set forth in paras. 158-160 of the Notice. There, the Commission reported that approximately 10,000 unserved area applications were filed between March 10 and May 12, 1993, of which approximately 9,000 are believed to be mutually exclusive applications. Given the large number of applications that were filed prior to July 26, 1993, and the criteria described in Section 309(j), in its Notice the Commission determined that it has the option of licensing these unserved area applications either by auction or lottery. See Section 6002(c) of the Budget Act. Moreover, the Commission proposed to license these facilities by auction based upon a belief that such licensing would be consistent with statutory requirements. In support of that position, the Commission avowed that the rapid deployment of new service to rural areas would be advanced by auctions because insincere applicants, who did not intend to build out their proposed systems, would

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5/ (...continued)
frequencies and that report must contain certain findings. In addition, the Commission must complete a rulemaking on a licensing of personal communications services.

be discouraged from competing in an auction. Notice at para. 160. The Commission also asserted that "under some of the auction procedures proposed herein, auctions would provide more opportunity for a wider variety of applicants to become cellular licensees." Id. Finally, the Commission proposed to limit the opportunity to enter the auction for unserved areas to applicants who filed prior to July 26, 1993.

The Notice provided no discussion with respect to the licensing of RSA applications. In the absence of any such discussion and in view of the Commission's determination not to schedule for relottery any RSA applications, the Coalition can only infer that the issue of how best to license RSA facilities has not yet been resolved.[6/]

B. Cellular Should Be Licensed by Lottery, Rather than Auction

1. Auctioning of Cellular Applications Would Constitute an Impermissible Retroactive Application of Administrative Rules and Law

There is no question but that licensing of cellular by auction would constitute a retroactive application of new law and administrative rule. Both Congress, in enacting the Budget Act, and the federal courts, in promulgating numerous decisions addressing this issue, have expressed a wariness of retroactive application. Congress's concern regarding

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6/ Although all RSA lottery markets have been initially lotteried, the Coalition understands that approximately 20-30 RSA markets are candidates for relottery, in view of there being defects with the applicants initially selected that preclude their being licensed.

retroactivity is evidenced by the fact that the statute itself establishes July 26, 1993, i.e., the date on which the legislation was enacted, as a pivotal cut-over date for determinations regarding FCC licensing. Section 6002 of the Budget Act specifically provides that the mere filing of applications prior to July 26, 1993, constitutes an independent, wholly sufficient basis for licensing the relevant markets via lottery, rather than auction.7/

The Supreme Court has also addressed the issue of retroactive enforcement of newly promulgated rules or law. It has established the overriding criterion that retroactive application is improper if "the ill effect of the retroactive application" of the rule outweighs the "mischief" of frustrating the interest that the rule promotes. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).8/ Whether, after applying the balancing test mandated by Chenery, retroactivity is permissible, is a legal question that can be resolved only

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7/ While the Budget Act can be construed to permit markets with applications filed before July 26, 1993, to be licensed by auction, unlike those applications filed after this date, there is no requirement to license by auction. Rather, the Commission is fully authorized to license them by lottery without having to justify such procedure. In contrast, in the event the Commission were to desire to license such markets by auction, it must comply with the numerous requirements set forth in Section I above.

8/ See also Retail, Wholesale, and Dep't Store Union v. NLRB, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("Retail Union") and Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), where the D.C. Circuit recognized the governing applicability of the Chenery test.

by analyzing the applicable facts and circumstances. Retail Union, at 390. When such questions are presented to reviewing courts, the courts treat them as a question of law for which no overriding obligation of deference to the agency exists. Id.

The court in Retail Union enunciated the particular factors to be considered in balancing the hardship from retroactive application against any public interest considerations. Retail Union, at 390; see also, Cellular Lottery Rulemaking, 98 FCC 2d 175, 182 (1984). These include (a) whether the issue presented is one of first impression; (b) whether the new rule presents an abrupt departure from well-established practice; (c) the extent to which the party against whom the new rule is applied relied on the former rule; (d) the degree of burden which a retroactive rule imposes on a party; and (e) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

The Coalition submits that each of these factors must be considered as the Commission determines whether auctions should be applied retroactively, and that any reasoned consideration of such factors can lead only to a determination not to license by auction. The Retail Union criterion, i.e., whether this is a case of first impression, can be easily resolved. The Cellular Applications were filed only after considerable attention was devoted to their licensing, and it

was affirmatively determined that they would be licensed by lottery. Indeed, at the time when licensing decisions were made, neither statute nor the Commission's rules permitted applicants to be licensed by auction. Thus, in no instance is this a case of first impression, and consideration of this factor lends no support to licensing by auction.

The next Retail Union factor to be considered is whether the new rule constitutes an "abrupt departure" from established practice. Simply put, it is difficult to fathom two licensing frameworks that are more disparate than lotteries and auctions and, therefore, where a change from one to another could be more "abrupt." Under one system, all applicants who meet basic qualifications established by the Commission are equally likely to be licensed; under the other, only those willing and capable of outbidding all other applicants will prevail. While lotteries present an opportunity for an applicant to "win" an authorization valued at many times its application fee, under auctions, "winning" bidders are likely to overpay or to underpay for the privilege of becoming a licensee. In view of these disparities, it may well be an understatement to describe the change from lotteries to auctions as only being "abrupt."

The third Retail Union consideration is the extent to which the Cellular applicants may have relied on lottery licensing rules when they determined to make application. In the case of RSA applicants, who filed their applications five

years ago, all informed applicants could rely only on licensing by lottery, since it was the only licensing mechanism authorized by rule and law. In the case of unserved area applicants, although they may well have been on notice that, in the future, applications would be licensed by auction, based upon Commission action and then-existing statute, they quite naturally would have inferred that this would be a last opportunity for licensing by lottery. There is no other logical inference that could have been drawn from the Commission's determination to move forward promptly with the acceptance of unserved area applications. In addition, the Commission provided no notice that the applicants could face a situation where applications filed under one licensing arrangements would be acted upon under a wholly distinct one.

Cellular applicants relied on existing rules when they determined to apply for Cellular authorizations to be lotteried. Under such rules, an applicants need only have assessed its basic qualifications. There was no form of comparative or competitive ranking of applicants, and all applicants meeting basic qualifications were equally likely to obtain a Cellular authorization.

Consideration of the fourth Retail Union criterion makes it clear that any change from lotteries to auctions would present grave burdens to Cellular applicants. Under a lottery system of licensing, any applicant who can demonstrate minimal financial and other qualifications has as great a chance as

any other qualified applicant to become licensed, regardless of the overall financial wherewithal of various members of the applicant group. A change to auctions would effectively eliminate from meaningful consideration for licensing all those applicants lacking financial wherewithal to challenge the most financially endowed among the applicants. Thus, for the most part, a change to auctions effectively eliminates any opportunity to become licensed for Cellular, and therefore presents the ultimate "burden" to applicants. Moreover, even where an applicant is financially strong enough to become licensed, it will be forced to pay at least fair market value for the authorization, as opposed to having an opportunity to obtain such authorization with no further financial commitment. Thus, a change from lotteries to auctions would cause even winning bidders to be saddled with a considerable financial burden.

The last Retail Union criterion to be applied is the statutory interest in applying a new rule retroactively. The Coalition submits that no such interest lies here. If Congress intended there to be retroactive application, it would not have established the July 26, 1993, cut-over date. Moreover, if Congress intended that any assessment of these criteria include a consideration of monies flowing to the government through auctions, the Congress would not have expressly forbidden consideration of that concept pursuant to Section 6002 of the Budget Act.

The Coalition stresses that a determination not to apply auctions retroactively would in no way affect the Commission's ability to extend the rule prospectively, and thus would have no negative effect on achieving the statute's goals. Moreover, there is a far less drastic alternative to retroactive rulemaking. The Coalition submits that limiting application of auctions to prospective use is the very type of less drastic alternative to retroactivity that the courts have required the Commission to consider. Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986).

In view of the above, the Coalition submits that any reasoned and articulated[9/] application of the balancing test set forth in Chenery and its progeny requires that the Commission apply its auction rules only prospectively.

2. Application of Statutory Auction Criteria Mandates that Cellular Applications be Licensed by Lottery Rather than Auction

If the Commission determines that retroactivity presents no bar to the use of auctions to license Cellular, then it must undertake the analysis mandated by the Budget Act to assess whether the Cellular markets here at issue are the type that should be licensed by auction, holding aside questions of retroactivity. The Coalition submits that any reasoned application of the applicable statutory auction criteria set

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9/ Not only must the Commission consider the applicable criteria in reaching a determination with respect to whether to apply standards retroactively, it must also articulate on the record its basis for arriving at its conclusion. See Yakima Valley, supra.

forth in Section 309(j)(2)(B) can only lead to the conclusion that both RSA applications and unserved area applications should be licensed by lottery rather than auction.

Section 309(j)(2)(B) first provides that the Commission must determine the use of competitive bidding will promote the development and rapid deployment of new technologies, products and services for the benefit of the public, without administrative or judicial delays. In order for this criterion to be met, it must be established that the technologies, etc., at issue are "new" rather than currently available in the market to be served. With respect to both RSA and unserved area markets, grant of the license at issue will not result in the deployment of any "new" technology, etc. Not only have the technologies, etc., here at issue been available generally for years, but in most instances they have long been available in the market in question. For example, in the case of most unserved area applications, applications were filed on only one of the two bands within a given market.10/ Moreover, the Coalition understands that in the majority of those instances where unserved area applications were filed for both bands within a market, the applications focused on different geographic areas within the market. As a result, the products and services to be made available

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10/ The Coalition's review of Public Notices released this year indicates that unserved area applications were filed in well over 100 markets, and that applications were filed for both bands in markets in fewer than 30 instances.

through licensing cannot legitimately be viewed as being "new."[11/]

The Commission has postulated that auctions could result in more rapid deployment of service due to the fact that insincere applicants who do not intend to build their proposed systems would be discouraged from competing in an auction. Notice at para. 160. The Coalition respectfully submits that the Commission's inference overlooks several key matters. First and foremost, the Commission already has in place rules that prohibit insincere applicants from becoming licensed. See Sections 22.921 and 22.922 of the Commission's rules.

While the history of RSA licensing reflects a great number of assignments and transfers of systems, it would be inappropriate to use raw figures regarding such transfers as a basis for leaping to the unfounded conclusion that the assignments stem from the presence of "insincere" applicants,

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11/ The Coalition appreciates that, conceivably, different licensees could make different types of services available within a given area. The Coalition submits that there is nothing in the legislative history of the Budget Act to support the contention that such minor differences, which effectively are differences in degree rather than in kind, are sufficient to constitute "new" services within the meaning of the Budget Act. In any event, even if such minor differences could legitimately be construed as constituting "new" services, any determination to that effect would have to be based upon a review of proposals of various applicants. Neither the unserved area applications nor the RSA applications currently on file provide any basis for the Commission to arrive at an affirmative, informed determination that "new" services are being offered, as it is required by law to do prior to making a finding that a service should be licensed.

that they involved any abuse of Commission rules, or that they contributed to any meaningful delay in operations. A far more reasonable inference is that the assignments reflect the fact that many applicants who are fully qualified, and who the Commission recognized as such, simply received and accepted offers that were too good to refuse.12/

Even if the Commission were in error when it reviewed and granted many of the assignment applications here at issue, the remedy for inappropriate assignments is to enforce existing rules regarding assignments rather than to establish new rules. See n.10, supra. It appears that the Commission has already taken steps towards that end, in the case of unserved area applications, by requiring that successful licensees construct and operate those facilities prior to assigning or transferring them. In any event, no evidence has been proffered to support the position that assignment or transfer of cellular facilities has resulted in delay in system construction or operation, or that licensing by auction would not have equal or greater delays. In this regard, the Coalition notes that licensing by lottery has now become somewhat mechanical and can be implemented quickly. There are relatively few protests filed, and few substantial delays

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12/ Indeed, any argument to the contrary would constitute nothing less than a charge that the Commission itself unilaterally abdicated its responsibility to enforce its own rules. See Reuters Limited v. FCC, 781 F.2d 946 (D.C. Cir. 1986), where Judge Starr stated the obvious: that the Commission cannot simply choose not to enforce selected portions of its rules.

in licensing. In contrast, any system of competitive bidding would be a new, untried system. Challenges will no doubt exist with respect to the overall establishment of auction rules, any determination to use auctions to license Cellular applications, and the conduct of auctions in various specific markets.

The Coalition also notes that a system of lotteries offers a greater likelihood than auctions that systems will be built and operated efficiently. Under lottery licensing, if a license were to be transferred, there is a greater likelihood that the transfer would be to an adjacent operator who could provide wide-area service. In contrast, under auctions, the winning bidder could be a party who vastly "overbids" for the market and subsequently falls into financial ruin. Indeed, the very nature of an auction almost assures that the winning bidder will have overvalued the market.

The Budget Act also requires the Commission to determine that competitive bidding will promote economic opportunity and competition by avoiding excessive concentration of licenses. The Coalition submits that it is self-evident that the use of auctions necessarily results in a greater concentration of licensees, and less diversification, than do lotteries. By way of illustration, if, as the Commission has proposed, the field of eligible applicants for unserved area authorizations includes only those applicants currently on file, by

definition, use of auctions cannot expand the pool from which licensees would be drawn. Moreover, as a practical matter, licensee selection will come from that small subset of existing applicants who possess the financial wherewithal to prevail in an auction.13/

Section 309(j)(2) also requires that the Commission license by a manner that recovers for the public a portion of the value of the spectrum available, while Section 309(j)(4)(C) prohibits the Commission from making its licensing determinations based upon the expectation of the revenues that would result from the use of competitive bidding. As each lottery applicant has already submitted a filing fee of $200.00 or more with its application, there is no question but that licensing by lottery would permit the Commission to recover a portion of the value of the spectrum. Moreover, while licensing by auctioning may result in the federal government receiving additional monies, the Commission is prohibited from basing any licensing determination upon that consideration.14/

13/ See also the Commission's Cellular Lottery Rulemaking decision, 98 FCC 2d 75 (1984), where the Commission championed lotteries as a means to increase diversity of licensees.

14/ The Coalition submits that a genuine question exists with respect to whether auctions provide the best means of raising revenues, and that Congress directed the Commission not to consider this factor largely in order to avoid debate regarding the best way to raise monies. If such a debate were to ensue, the Coalition submits that lotteries, accompanied by realistic user fees, could well be the most appropriate means to raise monies.

Lastly, Section 309(j)(2)(B) provides that the Commission must determine that auctions will promote efficient and intensive use of electromagnetic spectrum prior to authorizing such auction. The Coalition submits that use of auctions will likely inhibit such use, by virtue of diverting resources from the system to efforts to become licensed to operate the system. It is axiomatic that there are limits to what any entity can invest in a Cellular market. To the extent that any portion of that investment must be diverted to obtaining a license, it necessarily reduces the amount that is available to invest in the system itself.

C. Sufficient Notice to Permit Licensing of Cellular Applications by Auction Has Not Been Provided

There is one final reason that auctions are inappropriate for Cellular applicants: the Notice falls woefully short of providing the public with knowledge of how the Commission proposes to auction Cellular authorizations. There is no meaningful discussion of whether the Commission even tentatively believes that auctions are appropriate for RSAs. If they are believed to be appropriate, no basis for such belief is provided. No meaningful analysis is presented with respect to how the objectives and requirements of the Act will be adhered to in the context of RSAs. Finally, no informative discussion has been presented regarding how to address the fact that Cellular applicants long ago transmitted to the government considerable monies as application fees, which applicants are certainly entitled to some return on their

investment in the government, as well as on the investments necessary to obtain their applications.

III. Conclusion

For all the above reasons, the Coalition urges the Commission not to utilize auctions to license either unserved area applications or RSA applications. These applications were all filed before July 26, 1993, and the Congress clearly intended that auction authority not to be applied retroactively.

Even if the Commission determines that it has the discretion to license these long-ago filed applications by auction, the Commission must comply with the criteria set forth in the Budget Act before determining to license in that manner. Review of the applicable criteria, as presented herein, demonstrates unmistakably that such licensing is contrary to the desire of Congress.

Respectfully submitted,

COALITION FOR EQUITY IN LICENSING

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November 10, 1993

Attachment 1

COALITION FOR EQUITY IN LICENSING

The following entities and individuals, all of whom have pending cellular applications for Rural Service Areas or for unserved areas, are included in the Coalition for Equity in Licensing:

Acad-Cell Partnership
Active Communications
Air Cable Limited Partnership
Alfred Di Rico
American Rural Cellular, Inc.
Balanced Growth Fund
Bob Stark Limited Partnership II
Brian O'Neill, Inc.
Casey Enterprises
Cellular Consultants, Inc.
Cellular 428, Ltd.
CN Communications
Coastal Communications
Colvin Cellular Group
Cynthia M. Spittler
Derwood S. Chase, Jr.
Eastmont Interactive Television Partnership
Edward Clive Anderson
Ernest Leroy Passailaigue, Jr.
Frederic Lee Young
Garld George Kurtz
GEM Cellular
Hargray Holdings Corporation
Haskins Robert Inc.
Henry T. Finch
Hetafi, Inc.
J&J Communications
James R. Ross
JDG Inc.
Johanna B. Chase
Kimberly Southard Broz
Kingdon R. Hughes
Kitsap Cellular, Inc.
Kyle W. Mussman
LDG Inc.
LeFleur Cellular Partnership
Mid-South Telecommunications Co., Inc.
Midland Communications Corp.
Miller Communications
Minerich, Inc.

Namaqua Limited Partnership
Orwell Cellular, Inc.
Palmer Communications Incorporated
Palmer Cellular Partnerhip
Phillip C. Holt Corporation
Pioneer Telephone Cooperative, Inc.
Plateau Cellular, Inc.
Raymon R. Finch, Jr.
Robert B. Glenn
Robert J. Neborsky, M.D.
Rural Area Cellular Development Group
Silverdale Cellular, Inc.
Sunde Cellular Communications, Inc.
Sunshine Cellular
Sybarite Communications, Inc.
Totah Telephone Company, Inc.
W.G. Gillette, Jr.
Walnut Hill Associates
Warren Robert Haas
WHF, Inc.
William J. Coscioni